

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
February 9, 2006 Session

DWIGHT O'BRIEN JACKSON v. DARCILLA JEAN COBB JACKSON

Direct Appeal from the Chancery Court for Hamblen County
No. 2004-523 Hon. Thomas R. Frierson, II., Chancellor

No. E2005-01690-COA-R3-CV - FILED MARCH 13, 2006

The wife sued the husband for divorce and the Trial Court granted the wife a divorce, divided the parties' marital assets and awarded the wife alimony *in futuro*. The husband appealed the award of alimony *in futuro*. We affirm.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the Chancery Court Affirmed.

HERSCHEL PICKENS FRANKS, P.J., delivered the opinion of the court, in which D. MICHAEL SWINEY, J., and SHARON G. LEE, J., joined.

Edward R. Sempkowski, Morristown, Tennessee, for appellant.

Janice H. Snider, Morristown, Tennessee, for appellee.

OPINION

In this divorce action, the Trial Court awarded the wife alimony *in futuro* and the husband has appealed.

This was a marriage of 28 years with no minor children at the time of the divorce. The wife was born on February 8, 1952, and the husband was born on February 15, 1954. At the outset of the trial, the husband stipulated the wife's grounds for divorce, i.e., that he had committed adultery. The Trial Court, after hearing the evidence, ordered the husband to pay alimony *in futuro* of \$250.00 per week, and ordered the husband to pay the wife's COBRA health insurance through his employer for 24 months. Also, the Court ordered each party to pay his and her own attorney's

fees, and split the court costs equally. The Court divided the parties' marital property and their indebtedness, which is not an issue on appeal. The Court then discussed the alimony factors found in Tenn.Code Ann. §36-5-101(d), and recognized that the legislature had demonstrated a preference for rehabilitative alimony, and that alimony *in futuro* should only be awarded if the court found that rehabilitation was not feasible. The Court found the husband earned a gross salary of \$62,000.00 annually, and that the wife was not employed, had no income, and had monthly expenses of \$1,870.00. The Court stated that the "stress and anxiety of the present proceedings have exacerbated her symptoms of depression to the point that she currently cannot maintain gainful employment." The Court also noted that the wife had been employed before and had a college degree, and that she was currently going to counseling and taking medication.

The Court concluded that it had carefully considered all of the factors, and found the wife to be disadvantaged in comparison with the husband, and also found that she was unable to be rehabilitated. The Court thus concluded that alimony *in futuro* was appropriate.

Subsequently, the wife filed a Motion to Alter or Amend Judgment, asking the Court to specifically order the husband to maintain sufficient life insurance to secure her alimony payments. The Court granted the wife's Motion and ordered the husband to keep his life insurance in force to secure the alimony obligation, and denied the husband's Rule 59.02 Motion for a new trial.

On appeal, the husband insists that the Trial Court erred in awarding alimony *in futuro*.

We have previously said that "[t]rial courts have broad discretion in determining whether spousal support is needed and, if so, its nature, amount, and duration." *Anderton v. Anderton*, 988 S.W.2d 675, 682 (Tenn. Ct. App 1998). The Trial Court's alimony award should only be reversed by this Court when the trial court's discretion "has manifestly been abused." *Hanover v. Hanover*, 775 S.W.2d 612 (Tenn. Ct. App. 1989).

The statute regarding awards of alimony, Tenn. Code Ann. §36-5-101, provides:

It is the intent of the general assembly that a spouse who is economically disadvantaged relative to the other spouse, be rehabilitated whenever possible by the granting of an order for payment of rehabilitative, temporary support and maintenance. To be rehabilitated means to achieve, with reasonable effort, an earning capacity that will permit the economically disadvantaged spouse's standard of living after the divorce to be reasonably comparable to the standard of living enjoyed during the marriage, or to the post-divorce standard of living expected to be available to the other spouse, considering the relevant statutory factors and the equities between the parties. Where there is relative economic disadvantage and rehabilitation is not feasible in consideration of all relevant factors, including those set out in this subsection (d), the court may grant an order for payment of support and

maintenance on a long-term basis or until the death or remarriage of the recipient except as otherwise provided in subdivision (a)(3). An award of periodic alimony may be made either in addition to a rehabilitation award, where a spouse may be partially rehabilitated as defined in this subdivision (d)(1)(C), or instead of a rehabilitation award, where rehabilitation is not feasible.

While there is a preference for rehabilitative alimony, pursuant to the plain wording of the statute, and the instruction of *Ford v. Ford*, 952 S.W.2d 824 (Tenn. Ct. App. 1996), *Long v. Long*, 968 S.W.2d 292 (Tenn. Ct. App. 1997), and other cases dealing with this issue, it is not appropriate to award rehabilitative alimony where rehabilitation is not feasible. As the statute explains, rehabilitation means that the disadvantaged spouse can achieve, with reasonable effort, an earning capacity which will give that spouse a standard of living comparable to that which was enjoyed during the marriage, or which the other spouse enjoys post-divorce.

When determining the “nature, amount, length of term”, etc. for an award of alimony, the statutory factors which must be considered are as follows:

- (A) The relative earning capacity, obligations, needs, and financial resources of each party, including income from pension, profit sharing or retirement plans and all other sources;
- (B) The relative education and training of each party, the ability and opportunity of each party to secure such education and training, and the necessity of a party to secure further education and training to improve such party's earning capacity to a reasonable level;
- (C) The duration of the marriage;
- (D) The age and mental condition of each party;
- (E) The physical condition of each party, including, but not limited to, physical disability or incapacity due to a chronic debilitating disease;
- (F) The extent to which it would be undesirable for a party to seek employment outside the home because such party will be custodian of a minor child of the marriage;
- (G) The separate assets of each party, both real and personal, tangible and intangible;
- (H) The provisions made with regard to the marital property as defined in § 36-4-121;
- (I) The standard of living of the parties established during the marriage;

(J) The extent to which each party has made such tangible and intangible contributions to the marriage as monetary and homemaker contributions, and tangible and intangible contributions by a party to the education, training or increased earning power of the other party;

(K) The relative fault of the parties in cases where the court, in its discretion, deems it appropriate to do so; and

(L) Such other factors, including the tax consequences to each party, as are necessary to consider the equities between the parties.

Tenn. Code Ann. § 36-5-101.

The most important factors to consider in an award of alimony are need and ability to pay. *Ford*; *Long*. Further, the party obtaining the divorce should not be put in a worse financial condition than before the opposite party's misconduct which caused the divorce. *Long*. While alimony is not meant to provide a former spouse with total financial ease, it should be awarded "in such a way that the spouses approach equity." *Id.* at 294.

In this case, the wife testified that she was unable to work due to her physical and emotional problems, and that even if she could work, she only expected to earn what she did in her last job, which was about \$7.50 per hour. If the wife were able to work full-time at that rate, she would earn a gross salary of approximately \$15,000.00 per year. The husband, on the other hand, earned a gross salary of \$62,000.00 per year, which demonstrates the economic disparity between the parties.

The wife testified that her only skills were office-related, that she was not able to go to school with her problems, and that even if she could, she felt at 53 years old, she was too old to retrain or learn a new profession. Essentially, the husband did not dispute the wife's testimony. In fact, while he said he thought she could work, he admitted that her depression was severe, that her job skills were limited, and that at best she could try to get a "low level" job at a convenience store or gas station. The evidence does not preponderate against the Trial Court's finding that the wife cannot be economically rehabilitated, and the Court did not abuse its discretion in refusing to award rehabilitative alimony. Tenn. R. App. P. 13(d).

The statutory factors, as quoted, support the Trial Court's award of alimony *in futuro*. The husband has a much greater earning capacity, and the ability to pay, as evidenced by the fact that he had been paying the wife's bills and *pendente lite* support. The wife had no other source of income, and had monthly expenses of \$1,800.00, demonstrating her need for alimony. Both parties had bachelor's degrees, and the husband had done some work toward a master's. The marriage was of long duration, and the parties were of similar age, but the wife's mental condition was clearly much worse than the husband's. The wife's physical condition was also worse. She testified she

had physical problems which also impacted her ability to work, and the husband testified that he worked with no problem from his diabetes most of the time.

The Court divided the parties' property nearly equal, and there was no proof that either party had significant separate assets. The parties had enjoyed a comfortable standard of living during the marriage, and the husband has the ability to continue in this standard, but the wife does not have that ability without the husband's support. Each party had made contributions to the marriage as far as earning wages, and the husband's contribution in that regard was greater, but the wife took care of the house and children while the husband was earning wages. Finally, the husband stipulated that he had committed adultery, which was the cause of the breakdown of the marriage.

Considering the foregoing factors, we conclude the Trial Court properly found the wife was entitled to an award of alimony, and that the amount and duration of the award was reasonable given the parties' circumstances. We affirm the Trial Court's Judgment awarding the wife alimony *in futuro*, and remand, with the cost of the appeal assessed to Dwight O'Brien Jackson.

HERSCHEL PICKENS FRANKS, P.J.